Supreme Court, U.S.
FILED
SEP 8 - 2006
OFFICE OF THE CLERK

Docket no. **05-1634**

UNITED STATES SUPREME COURT

L. PAUL DIEFFENBACH, JR..
Petitioner *Pro Se*

V.

INTERNATIONAL REHABILITATION ASSOCIATES, INC
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL MOTION FOR A SUMMARY VACATUR

L. Paul Dieffenbach, Jr.
on his own behalf
13 Wyncroft Drive
Media, Pa, 19063
(610) 566-7783
PAULDIEF01@aol.com

AUTHORITY

The Court's authority to grant summary relief on the merits is enabled by SCR 16.1. While the Rule does not specifically allow that such relief may be sought by motion of a party, neither does the Rule say that it can't. Even if this is an unusual Motion, Movant begs the indulgence of the Court as the matter at issue is a particularly unusual decision.

In the not-too-distant past, this Court has used summary disposition on the merits only in the most unusual of cases; from what Movant can glean from studying this Court's website, however, the Court is making more liberal use of this efficient devise for issues sufficiently obvious to warrant this Court's intervention but not requiring full plenary consideration.

The two main criteria to justify summary action on the merits under SCR 16.1 is that the essential facts are clear and not in dispute, and that applicable law is well settled; as hereinafter set forth, this case meets these two criteria several times over.

PURPOSE

The purpose of this Motion is to bring directly to the immediate attention of the Court's what is *quite likely the single worst decision ever to come out of a federal appeals court* as being unilaterally and radically inconsistent with both fact and law and, accordingly, setting unthinkably bad precedent, As such, this Motion intends to demonstrate, the lower court's one-page whitewash of substantive issues badly in need of definitive precedent speaks for itself in making clear that the corrective hand of this Court is needed against errors so obvious that full plenary consideration would be a waste of this Court's valuable and limited resources.

By all rules of right, reason, and law, this case have never have even reached this Court..

TABLE OF CITATIONS

(writer's note: the at-issue decision is so far outside the limits of applicable law that there is little established precedent to either support or discredit it; hence the paucity of citation in this pleading)

U.S. Supreme Court cited:

Oebre v. Entergy Operations, Inc
522 US 422 (1998) 6

U.S. Third Circuit Court of Appeals cited:

Wastak v. Lehigh Valley Health Network;
342 F.3D 281 (2003) 7, 9

United Satates Code cited:

Older Workers Benefit Protection Act;
29 USC 626 6

MOTION FOR A SUMMARY VACATUR

Facts

By not availing themselves of their right, under the Rules of this Court, to respond to the initiating Petition for Writ of Certiorari, the Cigna Group (Respondent) acknowledges the facts as stated in the PetCert; including and in particular :

A) that Movant was the only one of the entire (layoff) group for whom direct replacements were recruited, hired, and trained (PetCert, p. 5 @ (14));

B) that the OWBPA statistical summary was "fudged" by the inclusion of the names of younger workers whom the company had no intention of laying off; and that the real target of the 2002 group layoff group was the 3 older workers (PetCert, p. 6 @ (15));

C) that the employer (Respondent) rebuffed all efforts by Movant to enter into negotiations for the OWBPA-intended "tailored" severance contract; demanding instead that Movant either execute an ADEA waiver as condition of receiving basic benefits or go out the door with nothing (PetCert, p. 6-7 @ (16, 17, 18)).

Other Admissionss and Concessions

One of the issues raised in the initiating Petition is whether employer-paid arbitrations give the employer purse-string leverage (if the paying party isn't happy with the "quality" of the arbitrator's work they can delay, dispute, or refuse payment of the provider's four or even five-figure billing) over both the arbitrator and the arbitration service provider and thus creates an obvious and substantial compromise of arbitration's basic guarantee of a blind and unbiased dispute-resolution forum (PetCert p. *iii,* @ (14); p. 10 @ (27),(28)). In their Brief wth the lower court, Respondent's attorneys all

but admitted that employment-dispute arbitration is **both** professional-favoritism **and** money bisaed by suggesting that Movant, as employee-arbitrant handling his own case (**f/n 1**), might have gotten a fairer shake from the arbitration process if he (Movant) had insisted on an arbitrator who is not a lawyer by trade (Exh 2, top) and/or been contributing a greater share of the total costs (Exh 2, center).

Not only is Cigna's statement that Movant "could have selected a non-lawyer (as arbitrator)" a dubious argument to be making in a case where the impartiality of the arrbitrator is being drawn into issue, but is completely untrue as a matter of fact. As set out the initiating Petition, of fourteen potential arbitrators offered to the parties, only *one* did not list their primary occupation as "attorney" (PetCert, p. 9 @ (26)), and Respondent's attorneys have never denied that the one non-lawyer was the first name removed as one of their three pre-emptive strikes (PetCert, p. 10 @ (29)), and, in fact, Movant complained directly to both the Association and the district court of the AAA's lack of qualified non-lawyer arbitrators to hear cases with an unrepresented party on one side and the arbitrator's fellow lawyers on the other.

The initiating Petition for Certiorari (p. 14 @ (44)) details how the arbitrator, who is an attorney by trade and is fully aware that his compensation is coming all but directly from the employer's legal department, without notice or opportunity of the affected parties to object, abandoned the published schedule of the proceedings and proceeded directly to *sua sponte* decision on the merits over the all-but-screaming objections of a party (PetCert p. 15 @ (45) also documents how Movant submitted a formal grievance to the Association over the matter). It is not necessary to repeat or recite such details as the district court not only observed, but seemed to emphasize, that the arbitrator reached his final decsion without a holding a proper hearing (Exh 3).

1. one of the supposed advantages, to lesser-strength parties, of arbitration is that the entire process is supposed to be "user friendly" and handling one's own case isn't supposed to carry the same negative stigma as it does in court.

Argument One

Once either or both of the lower courts established as on-the-record fact that the arbitrator proceeded directly to a *sua sponte* decision without notice or hearing. it shoild have been a knee-jerk decision to disallow the arbitrator's award.

Instead, the central premise of the lower courts' decisions is the finding that the employee-arbitrant (Movant) "agreed" to some unspecified alternative (to the official rules of arbitration) process, which "consent" included a standing, before-the-fact waiver to a hearing with the arbitrator (Exh 1-B and 1-C, ll 34-40). Not only is there *no evidence whatsoever* that the employee (Movant) ever gave anything even approaching such consent, but, on the contary, the record is abundantly clear that Movant had no intention of waiving his right to a full and fair hearing in front of the arbitrator; this Court should note that neither of the lower courts established exactly where this "consent" can be found, how it is worded, and. most importantly, how such "consent" survived the strict scrutiny to which courts are *supposed* to subject any waiver of an important right or protection.

Further, in order to make the implied-waiver theory "fly", CA3 is deliberately blurring the essential distinction between a *settlement*, which is an official pleading in which the parties agree to end an active lawsuit, and which has no legal force or effect until it is approved by the presiding judge and entered into the record, and a *release*, which is a private contract which may or may not carry any weight in court. **There is not now and never was any *settlement*** as that term is being used, or more correctly, ***mis***used, in the at-issue decision.

Viewing the real evidence in the light most favorable to the Respondent, Movant, at best, did nothing more than consent to the allowance of a certain type of motion to be made to the arbitrator (Exh 4), and even viewing such "consent" in this favorable light requires the courts to ignore the questions of whether there is any such thing as the court-type Motion for

Summary Judgment in arbitration, and whether the official Rules of the American Arbitration Association can be modified or set aside by private contract alone (Exh 5).

The fallacy of the central premise of the lower court's decision should be self-evident: the unexplained expansion of a weaker-strength party's simple consent to permit a specific type of arbitration motion into a standing consent to allow the arbitrator to proceed to directly to a final decision without notice, hearing, or discovery is not only grounds for summary reversal by this Court, but the entire idea is preposterous.

The ultimate futility of the lower courts' reasoning on this issue is established by the unconroverted fact that Respondent, as employment-dispute arbitrant, *never even made the requisite motion.* The record is clear and uncontested that the Respondent never made any such "Motion for Summary Disposition", as required by their own in-house rule, nor was there any mention of Cigna's whimsical "summary disposition" rule in the arbitraor's decision; repudiation of the official schedule and proceeding directly to a no-hearing decision, without notice or opportuntiy to object, was something the arbitrator simply did of his own choosing, without initiation or approval of anyone but himself.

Argument Two

As already noted, the lower's finding that Movant agreed to some vaguely construed "summary disposition" process by the arbitrator begs the obvious question of whether there is any place at all for the court-type summary judgment (or "summary disposition" as Respondent calls it) in employment dispute arbitration. Given that the employee is clearly the weaker-strength party to an arbitration contract, any such "agreement", if one did exist, would fairly bristle with issues about predatory, onconscionable, and overreaching contracts.

It is well settled at common law that a competent adult cannot consent to an intrinsically illegal act. This rule can and

should be applied by this Court to arbitration law; i.e, absent an official provision of the AAA's employment-dispute rules and practices sanctioning it, there is simply **no such thing** as the court-type motion for summary judgment in employment arbitration. Accordingly, the individual employee cannot "consent" to any such a watered-down alternative (to the official Rules of the AAA) process clearly intended to stack the deck in favor of the employer.

Inseparable from the consent issue is the matter of whether the official Rules of American Arbitration Association can be modified by private contract. The type of alternative process to which the lower court says Movant gave his consent requires a standing and substantial modification of the Rules of AAA (which the Association *says* it opposes **(f/n 2)**), as distinguished from a case-specific, single-instance deviation from a specific Rule (which the AAA does allow). Given that the official Rules of the AA are. for all intents and purposes, arbitration law, it should be obvious to this Court that the Rules of the AAA can no more be modified ot set aside by party-specific contract than can the Rules of this Court be modified or set aside by private contract.

In addition, this Court should also note that Respondent's self-serving summary disposition rule (Exh 4) is due-process deficient on its face in that it makes no provision for the other party to oppose it.

Despite being argued fully and repeatedly, these two issues were ignored by both lower courts in their zeal to find "consent" to a lesser process where there clearly was none.

Argument Three

In an effort to bolster what the lower court surely knew to be a tenuous line of reasoning ("consent" to a *sua sponte* decision by the arbitrator), the at-issue decision makes its own

2. Movant received nothing but excuses (not to act) from the AAA when he asked them to certify to the lower courts that it opposes modification or setting aside of its Rukles by private contract.

finding that Movant's ADEA waiver was "knowing and voluntary" as that essential term is defined by the 1991 Older Workers Benefit Protection Act (OWBPA; 29 USC 626). Again, this finding is so obviously defective on its face as to warrant summary reversal by this Court.

In 1998 OWBPA received a sweeping endorsement from this Court in *Oebre v. Entergy Operations, Inc*, 522 US 422, in which this Court found that OWBPA "sets up its own regime", and that each and every one of its requirements is absolute and must be strictly complied with. Most laid-off ADEA's (Movant included) would readily agree thst the single most important requirement of OWBPA is the mandate that the ADEA waiver not be imposed upon the receipt of monies the employer is already obligated to pay the employee upon cessation of employment; 29 USC 626 (f)(1)(D).

In a flagrant trivialization of both *Oubre*.and OWBPA itself, the lower court doesn't even mention the statutory tests of "knowing and voluntary", but rather makes a quantum leap directly from the mere fact that Movant received a severance check (Exh 1-B, ll.10-12) to a finding that the ADEA waiver was "knowing and voluntary" (Exh 1-C, ll.41-44 (note again misuse of the word *settlement* at both places **f/n 3**)).

As part of his cessation from employment from Cigna, Movant received the following monies, which were clearly defined in the severance contract as follows:

Basic severance:	$15,000.00
Late payment penalty (mandated by Pennsylvania wage laws)	$1,500.00
Resolution of wage garnishment claim	$1.044.96
Total:	$17.544.96

As a benefit promised to the employee (Movant) in the event of no-fault-of-his-own job loss, the **basic severance** is

3. Not only was the subject document not a "settlement" in either substance or form, but also was not captioned as a "settlement", and in fact did not even contain the word *settlement*.

clearly "something to which (Movant) is already entitled" as contemplated by OWBPA; likewise, the late payment penalty, which kicked in while Movant and Respondent argued over the madatory-release severance policy, is an entitlement as matter of statute, while reimbursement for a disputed 1998 wage garnishment is totally unrelated, factually, legally, and chronologically, to Movant's layoff from Cigna.

Stated in OWBPA's own language, none of the monies received by Movant can, even if viewed in the light most favorable to the employer, be considered to be the free-standing *consideration* given in exchange for surrender of ADEA rights and protections. Accordingly, the lower court's leap directly from the naked fact that Movant received a severance check, without examining what those monies represent, and howthey relate to OWBPA's *special consideration* clause, is clearly in error, and grounds by itself for summary reversal of the entire decision.

The fallacy in the lower court's seat-of-the-pants finding that Movant's ADEAwaiver was "knowing and voluntary" is further established by the fact that the one (!!) citation in the entire decision is grossly inapproriate to the point it is trying to support. The plaintiff in *Wastak v. Lehigh Valley Health Network* (Exh 1-C, l 46) was a disciplinary firing and, as such, *Wastak* was correct in finding that any severance pay Mr. Wastak received was **not** anything "to which (he) was already entitled" under OWBPA; the text of *Wastak* is also unclear as to whether the employer had a structued severance *plan* or gave out severances on a case-by-case basis; two distinctly different situations both legally and factually. *Wastak* is therefore a far cry from the case at bar where the employee is a reduction-in-force layoff protected by an ERISA-regulated job-loss benefit plan. Not only could the lower court not have picked a more inapproriate citation, out of the plethora of available cases on this topic, but lumping him in with disciplinary firings is a personal insult to Petitioner-Movant.

Argument Four

Underlying, and possibly even overriding, all of the aforegoing is still another in-and-of-itself grounds for this Court to vacate the entire CA3 decision without the need for plenary review: directly apparent from the record is the all but unarguable fact that the root issue should never have been sent to arbitration in the first place.

The original subject-matter issue is and always has been **not** whether this particular (severance) contract is illegally structured, but whether Respondent's severnace-pay **policy** mandating the execution of a general liabilty release as condition of receiving basic benefits, and from which policy a standard non-negotiable severance contract is drawn, is intrinsically illegal under the combination of OWBPA, Pennsylvania wage laws, and the long-standing public policy against employers' use of wages and benefits as leverage to exonerate themsleves from unrelated liabilities. Accordingly, before any arbitrator (or court) could find the release to be illegal, they would first have to find the policy itself to be illegal.

One of the cardinal rules of arbitration law is that no party can be compelled to arbitrate any matter not covered by the basic agreement. Whether the policy issue is INcluded in the arbitration agreement here is not even open to discussion as the issue is directly and succintly EXcluded from the Cigna arbitration program by the following statement:

> "The arbitrator will have no power to change Cigna's policies and procedures, including this one."
>
> Cigna Arb. R. 8 (see Exh 6)

This policy-matters restriction on the arbitrator is as clear and legally binding as the laws defining the jurisdiction of this Court, and arbitration-supervising courts are required to observe and apply it if called upon to do so; nevertheless, both lower courts inverted the long-standing rule that the particular

always controls over the general in matters of law and contract, and instead emphasized the basic one-sentence agreement to arbitrate "any" employment-related disputes.

Despite being argued by Movant at several places in the proceedings, the policy-matters exclusion was never mentioned by either of the lower courts in any of their writings.

Argument Five

Finally, aggregated to the compound errors inherent in the at-issue decision is the established point that the matter of whether the protected party's ADEA waiver is "knowing and voluntary" is simply not a summary disposition subject..

In *Oubre* this Court noted that the issue of "knowing and voluntary", as set forth in OWBPA, goes to the state of mind of the party and is, by itself, a material issue of fact. Likewise CA3 itself, in *Wastak*, noted that the issue of a "knowing and voluntary" ADEA waiver is a jury trial issue (see Exh 7). Accordingly, this Court should note with interest, not only does the only case citation (*Wastak*) in the at-issue decision not support the ultimate conclusion of the lower court, but rather *Wastak* actually works directly against it.

Thus, *even if* Cigna's summary dispoaition rule were other wise permissible, and *even if* Cigna had made a proper motion under their own rule, and *even if* AAA arbitrators had general authority to issue summary judgments, the decision, without a proper hearing, of the issue of whether Movant's ADEA waiver was "knowing and voluntary" is reversable error in and of itself

An agreement to arbitrate is not an agreement to trivialize federal rights and protections; diminution of the substance and importance of federal labor-law protections seems to be a recurrent theme in both lower courts' sending these matters to arbitration, and in particular their willingless to rubber-stamp a badly mishandled employment arbitration.

The At-issue Decsion Sets Shockingly Bad Precedent

The CA3 decision at issue goes far beyond mere bad reasoning; this decision is judicially irresponsible and just plain dangerous, Appellate leval courts have a strong public-interest obligation to be mindful of how their decisions not only bear directly on the immediate parties, but also how their decisions may impact all other persons subject to the same laws; this important socio-legal responsibilty has been clearly lost on the lower court, at least as far as this particular decision is concerned.

This Court should be appalled at the way CA3 is willing to preach bad law so as to help a major area corporation's legal department "save face" against a *pro se* litigant. This Court also needs to express its highest degree of disapproval of CA3's misuse of the "NOT PRECEDENTIAL" designation as a license to issue bad decisions. Even though the case was not publiished, it involves one of the city of Philadelphia's largest employers; in addition, both the arbitrator and the AAA's officers who fielded Movant's grievances, are aware of this case and following its outcome.

In one single short-sighted decision. the lower court has sent the following messages out to the parties, to Philadelphis area employerss and to the Third Circuit legal community at large:

√ given the green light to employers to smokescreen a general liability release as part of "earning" an ERISA benefit;

√ placed arbitrators on notice that they are free to jettison the official "rules of the game" at will in pursuit of a big paycheck with a minimum of work;

√ placed arbitrator providers on notice that their published promises of a "full and fair" dispute resolution forum are eseentially meaningless.

These rulingss put all persons protected by ERISA, ADEA, and OWBPA directly in harm's way. This reason alone is cause for this Court to rid the overall body of federal case law of this aberration as quickly and thoroughly as possible.

REASONS WHY SUMMARY ACTION IS JUSTIFIED

It shoud be obvious to the Justices of this Court, both collectively and individually, at first reading of the at-issue decision, that the lower court isn't even attempting to make a well-reasoned, objective, and *correct* resolution of the stated issues, but rather is grasping for excuses (a major "consent" which simply is not there; a finding that Movant's ADEA waiver was "knowing and voluntary" when it is clear that the ADEA-protected layoff's (Movant's) basic benefits were being held hostage to the forced execution of such a waiver) not to embarass Cigna's legal department and/or their high-priced attorney to to whom the "farmed out" the appellate work by finding a major (Cigna) company policy to be illegal at the behest of a disgruntled former employee who isn't represented by an attorney. Likewise, the very idea that three experienced federal appeals-court judges could indendently and objectively concur in this far-fetched decision literally defies rational belief (this Court will notice that of the three CA3 judges to whom the at-issue decision is ascribed, none of them are wlling to take direct "credit" for it; i.e, admit that they wrote it).

It is difficult to envision a one-page decision containing a greater number of errors, or more severe degree of error, than the at-issue CA3 decision. Taken in the aggregate, the at-issue decision is grossly and patently in error from first word to last; it is precisely this kind of decision for which this Court's powers of summary reversal/vacatur were given.

WHEREFORE, pursunat to all of the aforegoing, Movant prays the Court for the following relief:

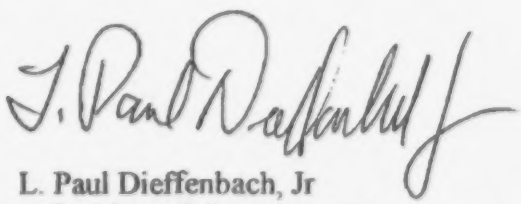
that the at-issue CA3 decision be **vacated in its entirety** as being clearly, patently, and entirely in error, and that the matter be sent back to the lower court with instructions to make a *real* decision on, at the very least, the ERISA/liability release issue; and that the matter be sent back to the lower court with the following intuitively obvious instructions:

1) absent an official Rule of the American Arbitration Association specifically providing for it, there is no such thing as a "Motion for Summary Judgment" in employment dispute arbitration;

2) the official Rules of the American Arbitration Association cannot be modified by private contract alone;

3) a genuine hearing before the arbitrator is a right guaranteed by both federal and state law(s), and , as with any important right, it can only be lost through clear, voluntary, and written, or otherwise on-the-record, waiver.

Respectfully submitted on the 8th day
of September, 2006



L. Paul Dieffenbach, Jr
Petitioner/Movant *pro se*

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4085

L. PAUL DIEFFENBACH, JR
Appellant

VS

INTERNATIONAL REHABLIITATION ASSOCIATES
d/b/a INTRACORP

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 02-cv-07903)
District Judge: Hon. J. Curtis Joyner

Submitted Under Third Circuit LAR 34.1(a)
October 14. 2005
Before SLOVITER, BARRY and FISHER, CJs

(Filed: October 18, 2005)

OPINION

PER CURIAM

1) Appellant, L. Paul Dieffenbach, filed this action against
2) his employer, Intracorp, claiming he was improperly deni-
3) ed sererance benefits and that his wages were improperly
4) garnished pursuant to a state tax lien. He later amended his

complaint to include claim of age discrimination and unlawful discharge to avoid pension vesting. On December 23, 2002, the District Court granted the motion to compel arbitration, holding that Dieffenbach was bound by the written agreement to arbitrate all disputes arising out of his employment. In 2004, the parties entered into a written Settlement Agreement and Release, calling for Intracorp to pay Dieffenbach $17.544.46. Dieffenbach took the position that the Release did not include his ADEA claim or ERISA discharge claim. An arbitrator granted Intracorp's motion for enforcement of the Agreement, holding that the Release covered all claims. Dieffenbach then returned to the District Court and sought to quash the award, while Intracorp moved for enforcement. On August 16, 2004 the District Court confirmed the arbitrator's award in all respects and dismissed the case. After the District Court denied Dieffenbach's timely filed motion for reconsideration, (he) timely filed this appeal. We have jurisdiction pursuant to 28 USC 1291 and 9 USC 16(a)(1)(D).

Dieffenbach raised a host of issues on appeal, but after a careful review of the record we find no basis to disturb the District Court's judgment. Among other things, Dieffenbach argues that the arbitrator impermissibly "reversed" a prior ruling by the District Court finding the waiver of his ADEA claims unenforceable, Appellant's Br. at 16. The record is clear, however, that the District Court did not consider the enforceability of the arbitration agreement or waiver of the ADEA claims until after the arbitration proceeding when it confirmed the award. Dieffenbach also contends that the arbitrator's award cannot stand because the arbitrator reached his decision without holding a hearing, Appellant's Br. at 24. As the District Court correctly observed, however, the arbitrator decided the

matter pursuant to to the parties' Settlement Agreement, and the Settlement permitted the issues to be heard and decided on a summary basis without a hearing. Moreover, the record fully supports a finding that Dieffenbach's execution of the arbitration agreement, as well as his execution of the Settlement Agreement and Release, were knowingly and voluntarily given, and Dieffenbach presents us with no credible or persuasive argument to the contary. Cf. *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281 (3rd Cir 2003).

We have considered Dieffenbach's remaining arguments, but we find those arguments without merit and in no need of separate discussion. We note that the Appellee's Brief fully and accurately sets forth the reasons why Dieffenbach's various contentions must be rejected. For the reasons stated, we will affirm the District Court's judgment.

Importantly, Plaintiff selected Mr. Colflesh as the arbitrator, knowing he was a lawyer. Plaintiff could have selected a non-lawyer. Pl. Brief at 3 n.1.[6]

Alleged Bias of the Tribunal. Plaintiff alleges, in effect, that the entire arbitration tribunal was tainted with bias, because it was paid for largely by one party, Defendant. Pl. Brief at 3 & 3 n.2. This could be construed as an effort vacate pursuant to FAA Section 10(a)(2), which allows a court to vacate "[w]here there was evident partiality or corruption in the arbitrators, or either of them." Under the standards set forth *supra*, page 20, Plaintiff has again failed to make the necessary showing.

The Court need look no further than the basic facts. It is undisputed that under the Arbitration Agreement, Plaintiff had the option of paying only a $100 filing fee, or sharing equally in the fees. Supp. App. at 60. It was *Plaintiff* who chose not to share equally in the fees, as he could have.[7]

---

[6] In addition to Plaintiff's consent to this practice, Plaintiff's argument was waived by his failure to raise this issue until after he knew his arbitration case was going to be dismissed. *E.g., AAOT Foreign Econ. Ass'n v. Intl. Dev. and Trade Services., Inc.*, 139 F.3d 980, 982 (2d Cir. 1998) (a party having knowledge of alleged bias of an arbitrator cannot remain silent for a period and then object, because the objection has been waived); *York Research Corp. v. Landgarten*, 927 F.2d 119, 122 (2d Cir. 1991) (an objection based upon facts known before the proceeding begins may not be raised after it has begun).

[7] Moreover, as with the failure to timely protest the appointment of a lawyer as arbitrator, Plaintiff failed to protest this practice before the arbitration tribunal in a timely manner, thereby waiving the objection. See discussion *supra* fn. 6.

Exh 2

Judgment of this Court as follows:

1. Defendant's Motion for Sanctions under FRCP 11 is DENIED;

2. Defendant's Motion for Enforcement of the Agreement and Release executed by Plaintiff on October 31, 2003 is GRANTED and in accordance with the terms and conditions of the Agreement and Release, this matter is DISMISSED pursuant to Local Rule of Civil Procedure 41.1 (b).

BY THE COURT

/S/ J. Curtis Joyner, J

---

any other misbehavior by which the rights of any party may have been prejudiced; or
(4) where the arbitrators exceeded their powers. or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

42 PaCSA 7341: Common law arbitration

The award of an arbitrator in a nonjudicial arbitration which is not subject to subchapter A (relating to statutory arbitration) or a similar statute regulating nonjudicial arbitration proceedings is binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption, or other irregularity caused the rendition of an unjust, inequitable, or unconscionable award.

In this case the record is devoid of any evidence that the award was the result of fraud, corruption, undue means, or bias, partiality, or misconduct on the part of the arbitrator. Thus we find no basis to vacate the award under the FAA.

The record is also very clear that there was no arbitration hearing in this case. Rather, the arbitrator decided this matter on the basis of the Agreement and Release hich the parties entered into on November 3, 2003 settling the claims claims which the plaintiff raised in this lawsuit and finding that the defendant's Motion for Enforcement of Agreement and Release should be granted. Included at para. 8 of that Agreement and Release is an Arbitration clause which provided in relevant part that plaintiff and defendant further agreed to arbitrate anything "related in any wat ot the validity of this Agreement, or how it is interpreted or implemented....by arbitration....conducted under the Employment Dispute

(Cigna Arbitration Rule) **12. Summary Disposition**

The arbitrator may, in his/her discretion, consider any motion for summary disposition, keeping in mind that the purpose of arbitration is a speedy and cost effective resolution of disputes. In determining whether to grant summary disposition, the arbitrator will apply the law in the same way as a federal court would in the same jurisdiction.

(Severance contract clause) **8. Arbitration.** Without in any way affecting the release in paragraph 4, any and all disagreements, or claims listed below will be resolved exclusively by arbitration in the city where you work today, or if there is no American Arbitration Association ("AAA") office in the city where you work, in the nearest city with an AAA office. Arbitration will be conducted under the Employment Dispute Resolution Rules of the American Arbitration Association, ***as modified by the Company*** (emphasis supplied). Copies of the Arbitration Policy and Rules of Procedure can be obtained from your Human Resources Representative.

(the remainder of the clause is omitted as irrelevant to the point being argued)

(Cigna Arbitration Rule) **8. Power of the Arbitrator**

Arbitration under the Rules and Procedures will be governed by the Federal Arbitration Act (Title 9 U.S.C. Sec 1, et seq) The arbitrator will have all the powers a judge would have in dealing with any question or dispute that may arise before, during, and after the arbitration hearing. The arbitrator's power is limited to rights which would be protected in court. The arbitrator must apply the burden of proof required by applicable federal, state, or local law. **The arbitrator will have no power to change Cigna's policies and procedures** (emphasis supplied), including this one, to change the law applicable to the facts, or to substitute his/her business judgment for that of CIGNA. **The arbitrator must enforce, and not deviate in any way, from these rules and procedures** (emphasis supplied).

against Lehigh Valley." Wastak answered that he did. As for Wastak's claim that he signed the waiver involuntarily given his financial circumstances and fragile mental state, while Wastak correctly notes that such claims should usually be decided by a jury, we agree with the District Court that Wastak has not come forth with sufficient evidence to create a genuine issue of material fact with regard to any lack of understanding or voluntariness on his part in signing the Release. Wastak testified that he was able to comprehend the nature of the Release. He was also of a sufficient mental state to make several attempts to retain legal counsel. Wastak asserts that after he was terminated he faced the prospect of serious financial pressures, conditions that ultimately caused him to suffer severe depression and anxiety, for which he sought psychological treatment and medication. There is, however, no evidence in the record to support the claim that he was experiencing mental impairments when he signed the Release, and the law is clear that the existence of financial pressure to sign a waiver is insufficient to establish that it was executed involuntarily. *See, e.g., Cirillo v. Arco Chem. Co.*, 862 F.2d 448, 452 n.2 (3d Cir. 1988) ("[E]conomic pressure alone is insufficient to establish a claim of duress that would void an otherwise valid release."); *Three Rivers Motor Co. v. Ford Motor Co.*, 522 F.2d 885, 893 (3d Cir. 1975).

Wastak's complaint also seeks relief under the PHRA, but that claim is similarly barred by the Release. As correctly noted by the District Court, the statutory provisions of the OWBPA apply only to ADEA claims, and thus, the effect of the Release with regard to the state PHRA claims is "determined by the ordinary meaning of the language contained therein." *Strickland v. Univ. of Scranton*, 700 A.2d 979, 986 (Pa. Super. Ct. 1997). Here, the Release unambiguously prohibits Wastak from pursuing claims under the PHRA, and Wastak has come forth with no evidence of fraud, duress or other circumstances sufficient to invalidate the agreement. *See, e.g., Bowersox Truck Sales & Serv., Inc. v. Harco Nat'l Ins. Comp.*, 209 F.3d 273, 279 (3d Cir. 2000) (stating, in a case involving Pennsylvania law, that " '[a] signed release is binding upon the parties unless executed and procured by fraud, duress, accident or mutual mistake.' " (quoting *Three Rivers Motors*, 522 F.2d